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No.

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MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

OCTOBER TERM, 1971

LEONARD L. BURSTEN, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Leonard L. Bursten petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on December 28, 1971.

OPINION BELOW

The Opinion of the Court of Appeals (App. A, pp. 1-16)* is reported at 453 F.2d 605.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fifth Circuit was entered on December 28, 1971. (App. A, pp. 1-16). On March 9, 1972, the Court of Appeals denied Petitions for Rehearing and for Rehearing *en banc*. (App. B, pp. 17-18). On March 30,

*"App." references are to Appendixes to Petition for a Writ of Certiorari filed herewith.

1972, Mr. Justice Powell extended to May 8, 1972, the time within which to file a Petition for a Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The District Court had jurisdiction under 18 U.S.C. §3231.

QUESTION PRESENTED

After a jury trial, Petitioner was convicted of tax evasion. In closing argument to the jury, the prosecutor commented on Petitioner's failure to testify. Petitioner made timely objection to the comments, but the trial court did not take immediate or effective action to dispel their prejudicial effect. On appeal, the United States Court of Appeals for the Fifth Circuit held that the prosecutor's infringement of Petitioner's right not to testify was cured by the trial court's routine jury instructions that "closing arguments [are] not evidence" and that "the jury should base its verdict solely on legally competent evidence" (App. A, p. 13). These general instructions did not refer to the specific offending comments.

The question presented is whether the giving of such routine and general jury instructions discharges a trial court's duty promptly and effectively to cure infringement of an accused's right not to testify.

In holding that a prompt and specific instruction was not required to correct the proscribed comments in this case, the opinion of the court below is in conflict with decisions of the United States Court of Appeals for the First Circuit in *Desmond* v. *United States*, 345 F.2d 225 (1965) and *Rodriguez-Sandoval* v. *United States*, 409 F.2d 529 (1969).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to The Constitution of the United States provides, in pertinent part, as follows:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

STATEMENT OF THE CASE

On October 12, 1965, Petitioner was charged by the Federal Grand Jury for the Southern District of Florida in a two-count indictment alleging: (1) that Petitioner had wilfully attempted to evade and defeat the federal income tax owed by him for the calendar year 1957, in violation of 26 U.S.C. §7201; and (2) that Petitioner had made and subscribed an individual federal income tax return, not believing it to be true and correct, in violation of 26 U.S.C. §7206(1). Petitioner was first tried in March 1966, at which trial count two of the indictment was dismissed by the trial court at the close of the Government's case. A conviction on count one was later reversed by the Fifth Circuit, and Petitioner was granted a new trial. *Bursten* v. *United States*, 395 F.2d 976 (5th Cir. 1968). The judgment of conviction in issue herein was entered by the trial court at the close of Petitioner's second trial, on June 4, 1970.

At that trial, the Government sought to prove that the manner in which two transactions were reported on Petitioner's 1957 tax return constituted a wilful attempt to evade taxes for that tax year. Petitioner decided not to testify, and the defense rested at the close of the Government's case. Then, at the "charge conference," at which instructions to be given to the jury were discussed, Petitioner requested that the Court instruct as follows:

> You are hereby instructed that the defendant does not have any burden of calling any wit-

> nesses or producing any evidence. You may not draw any adverse inferences from the defendant's failure to call witnesses, or produce evidence in this case. That is to say, the government must prove, by competent evidence, beyond any reasonable doubt, each element of the offense charged. The defendant may properly rely on the government's burden and rest his case without calling any witnesses, or producing any evidence. You may not draw any adverse inferences, or inferences of guilt from the fact that he does so elect. (Petitioner's Requested Instruction No. 22) [App. C, p. 19].

Although it first agreed to give a portion of the submitted instruction, the trial court ultimately refused to give any instruction specifically directed to the defense's failure to produce any evidence. The trial court deemed the requested charge already covered by its routine instructions on burden of proof and the accused's right not to testify. (App. D, pp. 20-22). Petitioner's objection to the trial court's denial of the requested instruction was duly noted. (*Id.* at p. 22).

Following the charge conference, counsel delivered closing argument to the jury. The prosecutor's initial summation concluded by calling Petitioner "a cheat," and vouching to the jury that Petitioner was guilty. Petitioner's counsel argued, stressing the failure of the Government to prove its case on certain specific elements. The prosecutor then began a brief rebuttal by asking the jury to compare the respective opening statements of counsel in the light of what later had actually been proved by prosecution and defense. The prosecutor concluded his remarks as follows:

> * * * *I submit to you that the defense panicked in this case.* I submit to you they didn't think the Government could do it. It did go back some years. Kadison showed up. Sawyer showed

> up. Burris showed up. Adcock showed up. *They panicked. They couldn't put on a defense, I submit to you. That's what happened.* [App. E, p. 24; emphasis added].

In the context of this case, the quoted remarks asked the jury to draw an adverse inference from Petitioner's failure to testify, and the Court of Appeals apparently so viewed them.

Petitioner's counsel promptly objected to the quoted remarks and moved for a mistrial. The trial court overruled the objection and denied the motion. After a recess was taken, the trial court instructed the jury, omitting any specific reference to the closing remarks of Government counsel. The court did, however, praise counsel for their "great zeal and skill in the representation of their clients." (App. F, p. 26).

In the Court of Appeals, Petitioner contended that the prosecutor's rebuttal argument was prejudicial and impermissible in its reference to defense's opening statements and its charge of "panic" and inability to put on a defense. Although the Court was "unable to affirmatively state that the prosecutor's comments . . . were properly within the realm of a fair response to defense argument," it held that error inherent in such comments was cured by the District Court's routine instructions–delivered without specific regard to such comments–"that the closing arguments were not evidence and that the jury should base its verdict solely on legally competent evidence." Because such instructions had been given, the Court held that the prosecutor's comments "did not constitute prejudicial error" under *Chapman* v. *California*, 386 U.S. 18 (1967).

REASONS FOR GRANTING THE WRIT

This case presents an issue of major significance as to appropriate trial court response to prosecutorial comments on a defendant's failure to testify. Such comments are constitutionally proscribed by the Fifth Amendment, whether they draw jury attention to the accused's silence expressly (*Griffin* v. *California*, 380 U.S. 609 (1965)), or by implication (*United States* v. *Handman*, 447 F.2d 853, 855 (7th Cir. 1971)). By ruling that such offending comments can be "cured" by general jury instructions given as a part of the trial court's routine charge, the Fifth Circuit has significantly impaired this established constitutional protection. In so doing, the Fifth Circuit has created a conflict between its decision and decisions of the United States Court of Appeals for the First Circuit in *Desmond* v. *United States*, 345 F.2d 225 (1965) and *Rodriguez-Sandoval* v. *United States*, 409 F.2d 529 (1969), and has effectively nullified this Court's ruling in *Chapman* v. *California*, *supra*.

There can be no question but that, in the context of this case, the remarks made by the prosecutor in his summation pointedly invited the jury to draw adverse inferences from Petitioner's silence. As expressed in *Desmond*, the standard is:

> Unless it is apparent on the record that there was someone other than himself whom the defendant could have called, the comment of necessity pointed to the only person who could have offered the contradiction, the defendant himself. [345 F.2d at 227]

There is no indication in the present case that anyone other than Petitioner could have contradicted the prosecution evidence on the critical elements of the offense charged, particularly the element of intent. The jury would, thus, inevitably look to Petitioner alone to rebut the points that the prosecutor urged. Indeed, the trial

court's view, articulated at the "charge conference," that the requested instruction on the defense's failure to put on any case was superfluous because the court had already decided to charge on Petitioner's own right not to testify, demonstrates that the trial court here made the same fatal linkage that the jury did. On this record, the conflict with the cited First Circuit decisions is clear.

In *Desmond, supra*, a case decided within weeks of *Griffin*, the prosecutor stated in closing argument that Government evidence on a key narcotics transaction stood "unimpeached and uncontradicted." The trial court overruled a defense objection to this comment, but added that it would later charge the jury that no inference adverse to the defendant should be drawn from his failure to testify. Although the promised charge was ultimately given, the First Circuit held that general instructions did not cure the error. In reversing the conviction, the Court said:

> Correction of error should be as prompt and timely as possible—particularly where the error involves the infringement of a constitutional right, as this did. Griffin v. State of California, 85 S.Ct. 1229, 4/28/65. The appellant promptly objected. The remedy, to be fully effective, should have been administered equally promptly. Smith v. United States, 9 Cir., 1959, 268 F.2d 416, 420; White v. United States, 1962, 114 U.S. App. D.C. 238, 314 F.2d 243. [345 F.2d at 226-227].

Later, in *Rodriguez-Sandoval, supra*, Government counsel argued to the jury that the evidence against the accused was "uncontradicted," and that "there is no evidence to the contrary." No exception was taken to these remarks. The trial court, nevertheless, instructed the jury that "[a] defendant is not required to testify in a criminal case and no presumption of guilt is raised and no inference of any kind may be drawn from the

failure of a defendant to testify." 409 F.2d 530, n. 3. The First Circuit reversed the defendant's conviction, saying:

> We think there was plain error here within the meaning of Fed. R. Crim. P. 52(b). Defendant's constitutional right not to testify was infringed. To begin with, although there was a certain sublety to the prosecution's remarks, the error was extremely aggravated from the quantitative standpoint. The prosecution hammered the point home relentlessly, stating in at least five different ways that its version of the December 26 happenings was uncontradicted. See Chapman v. California, 386 U.S. 18, 26, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967). Compare United States v. Goitia, 409 F.2d 524, decided by this court today; also see Holden v. United States, 393 F.2d at 277. In such a case we are unwilling to allow the government to act improperly and then avoid reversal by the unprovable assertion that grievous prejudice probably did not result.
>
> Indeed, the very persistence of the government in making these remarks is proof that it attached much importance to them. We do not say that the government was contumacious. It doubtless believed that its remarks were at least arguably consistent with our decisions. But one who attempts to define exactly the edge of the precipice approaches at his peril. [409 F.2d at 531].

In the present case, there was greater need for immediate "cure" of the prosecutor's remarks than in *Desmond* and *Rodriguez-Sandoval*. In those cases, the prosecutorial comments only directed attention to the objective fact of a lack of rebuttal evidence, which could have been ascribed by the jury to neglect, loss of records, *etc.* In the instant case, the prosecutor expressly attributed such lack to panic, and to an alleged inability to "put on a defense." These charges

of "panic" and "inability" suggested to the jurors that Petitioner had a "guilty fear" of testifying.

In *Rodriguez-Sandoval*, the First Circuit ruled that a routine jury instruction on the accused's right not to testify failed to dispel the prejudical effect of the prosecutor's comments, even though timely objection to such comments had not been asserted. In the instant case, where prompt objection was made, the court below held that even more perfunctory instructions, such as those dealing generally with the nature of closing argument, could achieve this cure. It should be noted that the comments which compromised Petitioner's rights here were not "subtle," like those in *Rodriguez-Sandoval*.*

A jury cannot be expected to infer from routine instructions that it must specifically disregard an inflammatory prosecutorial comment made at a different time. *United States* v. *Handman*, supra at 855. As early as 1893, this Court held that a "direct prohibition or emphatic condemnation" is required by the trial court when offending comments on failure to testify are made. *Wilson* v. *United States*, 149 U.S. 60, 67 (1893). More than forty years ago, the United States Court of Appeals for the Eighth Circuit ruled that the Fifth Amendment is satisfied in such situations only if a trial court "sharply, emphatically, and promptly advises the jury that the matter is improper and that they should give no consideration thereto.'" *DeMayo* v. *United States*, 32 F.2d 472, 475 (8th Cir. 1929).

*This case does not involve the issue whether the prosecutor's comments were "fair reply" to prior argument of defense counsel. The Fifth Circuit, after an extensive analysis of Government assertions of "fair reply," declined to decide the case on this basis. The appeals court was "unable to affirmatively state that the prosecutor's comments . . . were properly within the realm of a fair response to defense argument" and observed that "[t]he comments at issue are, if within the balance of permissible fair reply, at the very margin of that doctrine." (App. A, pp. 11-12).

From the foregoing, it is clear that the trial court in the instant case should not have relied on its "mild" general instructions to cure the prosecutor's comments. If given at the time of such comments, and with direct reference thereto, a jury instruction as to Petitioner's right not to testify might have mitigated the error. The preferable approach would have been for the trial court to deliver a specific admonition tailored to the particular offending remarks, to dispel their effects immediately and prevent their repetition. As the Seventh Circuit held in *Handman*:

> A cautionary instruction should have been given by the court promptly to erase any prejudice harbored by the jury because of Handman's failure to challenge or contradict Solomon's testimony. Id., 346 F.2d at 226-227; see Rodriquez-Sandoval v. United States, 409 F.2d 529, 530 (1st Cir. 1969). The general instruction given at the close of evidence would most likely be ineffective for that purpose. [447 F.2d at 855].

In *Chapman* v. *California, supra*, this Court stated that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24. In the instant case, could the Fifth Circuit have properly held, "beyond a reasonable doubt," that the trial court's routinely-delivered jury instructions rendered the constitutional error "harmless"? In fact, the Fifth Circuit lifted the burden imposed by this Court in *Chapman*. If the decision of the Fifth Circuit stands, a reversal under *Chapman* could never be obtained on *Griffin* grounds, no matter how extreme the prosecutorial comments.

CONCLUSION

Based on the foregoing, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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